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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC., and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the Rules on Containers, even though they attempt to assign to ILA members work performed by motor carrier and warehouse employees which was not diverted from the piers by the container innovation, are primary and lawful based on the view that an agreement cannot have an illegal work acquisition object unless the agreement's implementation has the effect of actually transferring the work sought from non-unit employees to unit employees.

PARTIES BELOW

The judgment of the court of appeals upon which review is sought was rendered in four consolidated cases.[1] The International Brotherhood of Teamsters, which is petitioning separately, was a party in two cases below (Nos. 83-1185(L) and 83-1486). Although separate petitions are being filed, for the Court's convenience, a Joint Appendix has been developed by American Trucking Associations, Inc. and Tidewater Motor Truck Association, the International Brotherhood of Teamsters, the American Warehousemen's Association and the International Association of NVOCCs. References to that Appendix will be designated below as A. ——.

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[1] Other parties in the consolidated cases (Case Nos. 83-1185(L), 83-1214, 83-1424 and 83-1486) include: American Trucking Associations, Inc. and Tidewater Motor Truck Association; International Association of NVOCCS; American Warehousemen's Association; Houff Transfer, Inc.; National Labor Relations Board; International Longshoremen's Association, AFL-CIO; New York Shipping Association, Inc.; Council of North Atlantic Shipping Associations; Florida Custom Brokers and Forwarders Association, Inc.; Twin Express, Inc.; International Container Express, Inc.; San Juan Freight Forwarders, Inc.; Chester, Blackburn & Roder, Inc.; Eagle, Inc.; Eller & Company, Inc.; Harrington & Company, Inc.; Strachen Shipping Company and Marine Terminals, Inc.; Coordinated Caribbean Transport, Inc.; International Longshoremen's Association, Locals 333, 846, 862, 921, 953, 970, 1248, 1355, 1416, 1416-A, 1429, 1458, 1526, 1526-A, 1624, 1680, 1736, 1783, 1784, 1819, 1840, 1922 and 1970, AFL-CIO; International Longshoremen's Association, Atlantic Coast District Council, AFL-CIO; International Longshoremen's District Council, Baltimore, Maryland; International Longshoremen's Association, Hampton Roads District Council, AFL-CIO; Hampton Roads Shipping Association; and Southeast Florida Employers Port Association.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The International Brotherhood of Teamsters petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in these cases (Nos. 83-1185(L); 83-1486) on May 9, 1984.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Fourth Circuit is officially reported at 734 F.2d 966; it is set forth in full in the Joint Appendix accompanying this petition for certiorari (A. 1a) and is unofficially reported at 116 L.R.R.M. 2311. The decision and order of the National Labor Relations Board (A.

35a) on which this review proceeding and enforcement action are based is officially reported at 266 N.L.R.B. 230, and is unofficially reported at 112 L.R.R.M. 1305.

JURISDICTION

The judgment of the Fourth Circuit Court of Appeals was entered on May 9, 1984 (A. 1a). Timely petitions for rehearing and suggestions for rehearing *en banc* were filed; they were later denied on July 31, 1984, with three judges voting to rehear the cases *en banc* (A. 31a).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Labor Management Relations Act of 1947 ("LMRA"), §§ 8(b)(4), 8(e), 29 U.S.C. §§ 158(b)(4), 158(e), are as follows:

Section 8(b), 29 U.S.C. § 158(b), provides in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> 4(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is:
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful . . . any primary strike, or primary picketing; . . .

Section 8(e), 29 U.S.C. § 158(e), provides in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby

such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void . . .

STATEMENT OF THE CASE

Factual Statement

The procedural history of this proceeding is complex.[1] Essentially, it encompasses nine NLRB cases challenging the legality of the Rules on Containers under the hot cargo and secondary boycott prohibitions of the LMRA. 29 U.S.C. § 158(b)(4), (e). The Rules are contained in collective bargaining agreements between the International Longshoremen's Association and various employer associations representing sea carriers and stevedoring

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[1] The cases involved in this proceeding, with their subsequent histories, are as follows: *Dolphin Forwarding, Inc.*, 236 N.L.R.B. 525 (1978), *enforcement denied and remanded*, 613 F.2d 890 (D.C. Cir. 1979), *aff'd.*, 447 U.S. 490 (1980); *Associated Transport, Inc.*, 231 N.L.R.B. 351 (1977), *enforcement denied and remanded*, 613 F.2d 890 (D.C. Cir. 1979), *aff'd.*, 447 U.S. 490 (1980); *Consolidated Express, Inc.*, 221 N.L.R.B. 956 (1975), *enforced*, 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977), *mandate recalled and remanded*, No. 75-4266, 2d Cir., Oct. 1, 1980; *Puerto Rico Marine Management, Inc.*, 245 N.L.R.B. 1320 (1979), *remanded*, No. ——, 5th Cir., (unreported); *Beck Arabia, Ltd.*, 245 N.L.R.B. 1325 (1979), *remanded*, No. 79-1672, 4th Cir., Dec. 24, 1980; *Terminal Corp.*, 250 N.L.R.B. 8 (1980) (reconsideration granted *sua sponte*); *Hill Creek Farms, Inc.*, Case Nos. 4-CC-1133, 4-CE-55 (then pending before NLRB); *Custom Brokers & Forwarders Ass'n. of Miami, Inc.*, Case No. 12-CE-30 (then pending before NLRB); *American Trucking Ass'n., Inc.*, Case Nos. 22-CC-806 to -808 and 22-CE-44 to -46 (complaint issued Feb. 10, 1981). On January 19 and February 18, 20, 1981, the NLRB issued orders consolidating the foregoing cases for hearing on the issues raised by this Court's decision in *NLRB* v. *Longshoremen's Ass'n.*, 447 U.S. 490.

concerns (A. 207a-239a).[2] This proceeding was begun after the Court, in *NLRB* v. *Longshoremen's Ass'n.*, 447 U.S. 490 (1980), faulted the Board's earlier work preservation analysis and remanded *Dolphin Forwarding* and *Associated Transport* for reconsideration. Other pending cases, including one that was newly filed by the Trucking Group, as well as one closed case that was reopened and remanded to the Board, were then consolidated with those remanded by this Court (A. 44a-45a).

Although the Rules on Containers have a lengthy history in waterfront labor relations,[3] it suffices to note here that they were developed as a result of the container innovation and emerged in the Shipping Group's 1968 collective bargaining agreement (A. 9a-10a). In 1974, the parties adopted the so-called "Dublin Amendment" that interpreted the Rules and strengthened their enforcement (A. 10a-11a). It also expanded the Rules' application to all containers stuffed and stripped within fifty miles of port areas by persons other than employees of the cargo's beneficial owner. As so interpreted and expanded, the Rules have been included in the Shipping Group's collective bargaining agreements since 1974 with minor variation (A. 47a; 207a-239a).

Among the changes in the Rules made by the Dublin Amendment were those dealing with the established practice of "shortstopping" full shippers' load ("FSL") containers. FSL containers hold goods owned by a single shipper or consignee.[4] Although destined for delivery in-

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[2] The Employers and Unions bound by the Rules will be referred to collectively as the "Shipping Group," while those challenging the Rules, including the Teamsters, will be referred to as the "Trucking Group."

[3] The Rules on Containers and their history have been described many times. See cases and authorities cited in note 1 *supra*.

[4] In contrast, less than container load ("LCL") containers are those in which goods belonging to more than one shipper or consignee are consolidated, and which have been subject to the Rules since 1967 (A. 84a).

tact to consignees, both export and import FSL containers often were stopped short of their ultimate destinations by truckers, and unloaded or loaded at trucking stations in port areas for reasons unique to surface transportation. Cargo is transferred off-pier between containers and over-the-road equipment by Teamsters to consolidate freight consigned to the same destination into trailers having a greater capacity than the largest container; to avoid deadhead runs with empty containers; to minimize per diem charges for containers; and to assure equipment compatibility (A. 132a-137a). These and other economic or safety-related reasons warranted the continuation of shortstopping after the container innovation. Under the Dublin Amendment, however, FSL containers from which cargo is discharged by persons other than the consignee's own employees within the fifty-mile zone are to be handled at a waterfront facility by deepsea ILA labor (A. 224a).

In 1975, the Rules were modified in their application to warehousing practices (A. 232a). Previously, FSL cargo could be stripped by non-ILA labor at public warehouses in port areas if normal storage fees for thirty days were paid and title remained with the beneficial owner of the cargo for that period (A. 226a). At the ILA's insistence, the warehouse exception was eliminated altogether for export cargo and narrowed for import cargo by requiring its actual storage for thirty days (A. 10a-11a). These modifications caused the Rules to cut more deeply into traditional practices followed by inland public warehouses. This is particularly true so far as the Rules apply to specialized warehousing services—e.g., inventorying, stockpiling and special processing of goods—never before performed at the piers (A. 141a, 144a n.58).

The shortstopping and specialized warehousing services that the Rules sought to capture and bring to the piers traditionally have been performed by Teamsters, as incidents of surface transportation, either before marine transportation began or after it ended. Unlike the work

performed by employees of some off-shore consolidators, shortstopping and specialized warehousing were not created by the container innovation and did not divert work from the piers to the detriment of longshoremen. In performing these surface transportation functions, which existed before containerization, Teamsters are not engaged in the functional equivalent of deepsea longshore work (A. 133a-135a).

Under the Rules, FSL containers are to be loaded or unloaded "only at a waterfront facility by deepsea ILA labor," even if the container is designated for a single consignee, so long as it is loaded or discharged within a fifty-mile radius of the port by persons other than the shipper's own employees. This requirement, of course, causes shippers and sea carriers to use truckers and warehousemen having facilities outside the fifty-mile radius, and to cease doing business with those inside the geographic areas covered by Rules, to avoid double handling of cargo (A. 294a-302a). It may also cause container handling incidental to surface transportation to be performed at the piers. Work is lost by inland employees in both situations.

Decision Of The NLRB

The Board adopted the findings and conclusions of Administrative Law Judge Harmatz with only two changes. First, it explicitly defined the work in controversy as "the initial loading and unloading of cargo within 50 miles of a port into and out of containers owned or leased by shipping lines having a collective-bargaining relationship with the ILA" (A. 57a-58a, 59a). Using this definition, the Board agreed that the Rules had an overall work preservation objective, and were lawfully applied to recapture traditional longshore work that had been diverted from the piers by containerization. Second, while agreeing that the Rules had an illegal work acquisition objective as applied to shortstopping and certain warehousing operations (A. 58a-

59a), the Board modified the Administrative Law Judge's rationale in finding these violations.

Administrative Law Judge Harmatz concluded that the Rules' application had an illegal objective because they "seek to compensate longshoremen for [job] losses at the expense of inland employees whose jobs did not derive from containerization . . ." (A. 123a). The Board thought it unnecessary to rely on these findings. Instead, it concluded that the Rules' application to shortstopping and specialized warehouse services violated § 8 (e) of the Act because "the duplicative work of the longshoremen, in handling cargo which is then rehandled by truckers and warehouses, no longer exists as a step in the cargo-handling process" due to the efficiency of the new container technology (A. 59a). So far as the Rules were applied to acquire work to replace that which had disappeared due to technological change, they were tainted with an illegal work acquisition objective.

Decision Of The Court Of Appeals

On cross petitions for review and enforcement, the Fourth Circuit Court of Appeals upheld the legality of the Rules on Containers in their entirety (A. 29a). It denied the Trucking Group's petition for review and the Board's petition for enforcement of its orders prohibiting the Rules' application to shortstopping and certain warehousing practices. The Shipping Group's petition for review was granted (A. 30a). Agreeing with the Board, the court of appeals held that the Rules represented a lawful exercise of the work preservation doctrine because they sought to preserve work traditionally performed by bargaining unit employees, and were addressed to the shipping employers who actually possessed the power to assign the work in question (A. 26a).

On the other hand, the lower court held that the Board erred as a matter of law by deciding that the Rules' application to shortstopping and specialized ware-

housing violated the Act's proscriptions against secondary activity. In the appellate court's view, the Board failed to support its conclusion that the Rules were unlawfully applied to acquire the work of trucking and warehouse employees by a finding that such off-pier work actually had been transferred to the piers to be performed by longshoremen. It thought that mere duplicative container handling at the piers would not affect employees of truckers and warehousemen, who would continue to do what they did prior to containerization (A. 27a-28a).

This petition seeks review of the decision below to the extent enforcement of the Board's order prohibiting the Rules' application to shortstopping and specialized warehouse practices was denied by the court of appeals (A. 30a; 60a-61a).

REASONS FOR GRANTING THE WRIT

1. The lower court has decided an important issue of federal labor law contrary to principles repeatedly announced by this Court. A violation of the Act's hot cargo prohibition, 29 U.S.C. § 158(e), is made out by a showing that an agreement between an employer and a labor organization requires the cessation, either partial or total, of business relationships and has a secondary objective. *National Woodwork Mfrs. Ass'n.* v. *NLRB*, 386 U.S. 612, 635 (1967). See also *NLRB* v. *Local 825, Operating Engineers*, 400 U.S. 297 (1971). An agreement that seeks to acquire new work is secondary and prohibited by § 8(e). *NLRB* v. *Enterprise Ass'n. of Pipefitters*, 429 U.S. 507, 529-30 (1977). *Pipefitters* explicitly rejected the notion that "workers may legally demand that their employer cease doing business with another company even if the union's object is to obtain new work so long as that work is for the benefit of . . . [unit] employees." *Id.* at 528-29 n.16.

In the instant case, the court of appeals held that the Board failed to support its conclusion that the Rules were unlawfully applied to acquire the work of trucking and warehouse employees by a specific finding that such off-pier work actually had been transferred to the piers to be performed by longshoremen. It said that under the Rules, "truckers and warehousemen do precisely what they did before the change in technology; the longshoremen have acquired none of that work" (A. 28a).[5] Thus, the court below introduced an entirely new element into traditional primary-secondary analysis, that is, a requirement that the object of acquiring new work through secondary pressure actually succeed.

This novel requirement is completely at odds with the established principle that the *object* of an agreement calling for the disruption of a business relationship, not its *effect*, is determinative of the agreement's validity. After all, the benefit to bargaining unit employees of acquiring new work cannot validate a secondary agreement. *Pipefitters*, 429 U.S. at 529-30. Similarly, the effect of a work preservation agreement on the employment opportunities of employees outside the bargaining unit is irrelevant to the agreement's validity. *Longshoremen*, 447 U.S. at 507 n.22. The benefit to bargaining

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[5] The court of appeals apparently believed that the Rules merely call for duplicative handling of containers, both at trucking stations or inland warehouses and also at the piers. This understanding, which we submit is faulty, is contradicted by undisputed record testimony that the Rules' enforcement will force all container handling in the surface transportation industry outside the 50-mile zone (A. 294a, 297a, 330a). Even the requirement of double handling restricts the right of motor carriers and inland warehousemen to do business in the normal way with shippers and sea carriers. Like the payment of fines levied by the ILA, it is simply an "injurious alternative" (due to the added transportation costs) to a complete cessation of business. *Id.* See *Teamsters Local 85 (Southern Pacific Transportation Co.)*, 199 N.L.R.B. 212, 215 (1972).

unit employees and the detriment to non-unit employees are simply effects of the conduct or agreement in question. Once an illegal work acquisition motive is demonstrated, as here, it is immaterial whether non-unit employees were actually deprived of their work.

The tactical object of the Rules and their maintenance is to acquire for longshoremen work traditionally performed by employees of motor carriers and specialty warehousemen in the context of surface transportation within the fifty-mile zone. The device for attaining this object is a contractual requirement calling for a considerable disruption of established business relationships which may take the form of a complete cessation of business (Rule 1(e), A. 225a), or various injurious alternatives involving the exaction of economic penalties [6] or loss of the work in question by inland employees.[7] The Rules' object to influence secondary employers, by itself, is sufficient to demonstrate their secondary aim. *National Woodwork*, 386 U.S. at 645. Full attainment of the secondary object is unnecessary to make out a § 8(e) violation.

2. The decision of the court of appeals is in conflict with *Longshoremen*, 447 U.S. 490. There, the Board was instructed:

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[6] One penalty would be a fine of $1,000 for each container handled in violation of the Rules payable by the sea carriers which would then seek reimbursement from the offending motor carrier or specialty warehousemen (A. 47a). Another penalty would be the added transportation costs caused by the double handling of FSL containers. See note 5 *supra*.

[7] To avoid the economic penalties described above, see note 6 *supra*, the sea carriers and stevedoring companies must do business with motor carriers which arrange for container handling incidental to surface transportation at the piers, or transport containers intact within the 50-mile zone. Necessarily, compliance with the Rules applicable to FSL containers will diminish work opportunities for inland employees (A. 295a; 298a-299a; 301a).

> "to look at how the contracting parties sought to preserve that work [traditional longshore work], to the extent possible, in the face of a massive technological change that largely eliminated the need for cargo handling at intermediate stages of the intermodal transportation of goods, and to evaluate the relationship between traditional longshore work and the work which the Rules attempt to assign to ILA members. . . ." [*Id.* at 509 (footnote omitted).]

The legal test is "whether the historical and functional relationship between this retained work and traditional longshore work can support the conclusion that the objective of the agreement was work preservation rather than the satisfaction of union goals elsewhere." *Id.* at 510 (footnote omitted).

After an exhaustive analysis, Administrative Law Judge Harmatz found that the FSL container work claimed by the Rules is not historically and functionally related to the traditional longshore work of loading and unloading ships. Rather, "it is work assumed for a different purpose, and in a different segment of the transportation industry. . . . [It] neither competes with maritime cargo handling nor amounts to a subterfuge to oust longshoremen of their traditional work. . . ." (A. 134a-135a). Without rejecting this factual finding, the Board chose to rely on "the fact that, because of the efficiency of the new technology, the duplicative work of the longshoremen, in handling cargo which is then rehandled by truckers and warehouses, no longer exists as a step in the cargo-handling process. . ." (A. 59a).

At the Board level, therefore, clear factual findings showed that one object of the Rules was to capture FSL container work that was not historically and functionally related to traditional longshore work in order to replace that which had disappeared altogether from the cargo-handling process due to the development of container technology. The finding that traditional longshore work had not been diverted from the piers to motor carrier

or warehouse employees by the containerization of cargo was an essential predicate for the Board's ultimate factual conclusion that the longshoremen's duplicative, pier-side work had disappeared. Admittedly, the Board's reasoning is less than crisp; yet its essence is apparent. A line was drawn between traditional unit work that had been diverted to non-unit employees by the new technology and work that had not been diverted but had disappeared entirely. The former work could be lawfully claimed by the Rules, but the ILA's attempt to replace the latter work with work performed by non-unit employees constituted illegal work acquisition.

In distinguishing between primary and secondary activities, it is sometimes necessary to draw lines "more nice than obvious." *Local 761, Electrical Workers* v. *NLRB*, 366 U.S. 667, 674 (1961). The court below, however, drew no lines at all. It rejected the Board's attempt to distinguish, for purposes of the work preservation doctrine, between traditional longshore work that had been diverted from the piers, thus becoming fairly claimable, and work that had not been diverted but was being claimed to replace work that had disappeared altogether. Indeed, the court below made no effort "to evaluate the relationship between traditional longshore work and the [container work involved in shortstopping or specialty warehousing] which the Rules attempt to assign to ILA members. . . ." *Longshoremen*, 447 U.S. at 509 (footnote omitted). Rather, it stated erroneously that the work claimed had not been transferred to the piers because inland employees had not lost it.

Previously, we have shown how far the lower court strayed from established primary-secondary analysis. Of equal importance is the realization that its decision is standardless. No restrictions whatever are recognized, except those contained in the Rules themselves. All container work is now claimable by the ILA whether or not it is the functional equivalent of traditional longshore work once performed at the piers. Under the decision of

the court of appeals, the apprehensions expressed by the dissent in *Longshoremen*, 447 U.S. at 527-28, have become a reality. And, the majority's conclusion that "the result [in this case] will depend on how closely the [shipping] parties have tailored their agreement to the objective of preserving the essence of traditional work patterns. . ." has been totally ignored. *Id.* at 510 n.24.

Review by this Court is warranted. Otherwise, the work of motor carrier and warehouse employees, which was not diverted from the piers, and which was never part of traditional maritime work patterns, will be acquired by longshoremen under the Rules' expansive sweep. As this Court has recognized, the permissible bounds of work preservation presents an "important question of federal labor law." *Longshoremen*, 447 U.S. at 493. The broad impact of the lower court's decision, affecting thousands of marine and surface transportation employees, as well as its potentially dispositive nature, demonstrates the particular importance of the work preservation issues presented here.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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